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Comparative Company Law 2018

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Klaus J. Hopt
Max Planck Institute for Comparative and International Private Law and ECGI

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Abstract

Comparative company law is at once very old and very modern. It is very old because ever since companies and company laws first existed, trade has not stopped at the frontiers of countries and states. The persons concerned, practitioners as well as rule-makers, had to look beyond their own city, country, rules, and laws. This became even more true after the rise of the public company and the early company acts in the first half of the nineteenth century. Ever since, company lawmakers have profited from comparison. But comparative company law is also very modern. Most comparative work has focused on the main areas of private law, such as contract and torts, rather than company law. Internationally acknowledged standard treatises on comparative company law took a very long time to emerge. Company law and comparative company law work remained a task for professionals. The few academics who joined in this work tended also to be practitioners (such as outside counsel, arbitrators, or advisers to legislators), who were less interested in theory and doctrine.

This changed only fairly recently with the spread of 1930s US securities regulation into Europe, the company law harmonization efforts of the European Community since the late 1950s, and most recently, in the 1990s, with the rise of the corporate governance movement, an international bandwagon that started in the United States and the United Kingdom, swooped over to Continental Europe and Japan, and has since permeated practically all industrialized countries. Corporate governance covers core company law, particularly the board and more recently also the shareholders and other stakeholders like employees. But it reaches well beyond classical company law into other areas of law, in particular capital market law, that is, securities regulation and most recently bank regulation; into other forms of rulemaking, in particular self-regulation and codes; and into disciplines other than law, in particular economics. In stark contrast to traditional company law, corporate governance, as it is presently studied and practised, is essentially international and interdisciplinary. It follows that comparative company law today is to a considerable degree part of comparative corporate governance, though casebooks and case-based books on corporate law are now available.

Keywords: Bank Governance, capital market law, code movement, Company Law Action Plan, comparative law, corporate governance, enforcement, European company law, European Court of Justice, groups of companies, harmonization, investor protection, Konzernrecht, legal families, principal-agent, regulatory competition

JEL Classifications: G18, G21, G3, G38, K22

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Comparative Company Law 2018[*]

Klaus J. Hopt[**]

Survey

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Abstract

Comparative company law is at once very old and very modern. It is very old because ever since companies and company laws first existed, trade has not stopped at the frontiers of countries and states. The persons concerned, practitioners as well as rule-makers, had to look beyond their own city, country, rules, and laws. This became even more true after the rise of the public company and the early company acts in the first half of the nineteenth century. Ever since, company lawmakers have profited from comparison. But comparative company law is also very modern. Most comparative work has focused on the main areas of private law, such as contract and torts, rather than company law. Internationally acknowledged standard treatises on comparative company law took a very long time to emerge. Company law and comparative company law work remained a task for professionals. The few academics who joined in this work tended also to be practitioners (such as outside counsel, arbitrators, or advisers to legislators), who were less interested in theory and doctrine.

This changed only fairly recently with the spread of 1930s US securities regulation into Europe, the company law harmonization efforts of the European Community since the late 1950s, and most recently, in the 1990s, with the rise of the corporate governance movement, an international bandwagon that started in the United States and the United Kingdom, swooped over to Continental Europe and Japan, and has since permeated practically all industrialized countries. Corporate governance covers core company law, particularly the board and more recently also the shareholders and other stakeholders like employees. But it reaches well beyond classical company law into other areas of law, in particular capital market law, that is, securities regulation and most recently bank regulation; into other forms of rulemaking, in particular self-regulation and codes; and into disciplines other than law, in particular economics. In stark contrast to traditional company law, corporate governance, as it is presently studied and practised, is essentially international and interdisciplinary. It follows that comparative company law today is to a considerable degree part of comparative corporate governance, though casebooks and case-based books on corporate law are now available.

I. Introduction

COMPARATIVE company law is at once very old and very modern. It is very old because ever since companies and company laws first existed, trade has not stopped at the frontiers of countries and states. The persons concerned, practitioners as well as rule-makers, had to look beyond their own city, country, rules, and laws. This became even more true after the rise of the public company and the early company acts in the first half of the nineteenth century. Ever since, company lawmakers have profited from comparison.

But comparative company law is also very modern. Most comparative work has focused on the main areas of private law, such as contract and torts, rather than company law. While the law of business and private organizations was covered in the voluminous *International Encyclopedia of Comparative Law*,[1] and national company law books and articles occasionally also provided some comparative information, internationally acknowledged standard treatises on comparative company law took a very long time to emerge.[2] Company law and comparative company law work remained a task for professionals. The few academics who joined in this work tended also to be practitioners (such as outside counsel, arbitrators, or advisers to legislators), who were less interested in theory and doctrine.

This changed only fairly recently with the spread of 1930s US securities regulation into Europe, the company law harmonization efforts of the European Community since the late 1950s, and most recently, in the 1990s, with the rise of the corporate governance movement, an international bandwagon that started in the United States and the United Kingdom, swooped over to Continental Europe and Japan, and has since permeated practically all industrialized countries. Corporate governance covers core company law, particularly the board and more recently also the shareholders and other stakeholders like employees. But it reaches well beyond classical company law into other areas of law, in particular capital market law, that is, securities regulation and most recently bank regulation; into other forms of rulemaking, in particular self-regulation and codes; and into disciplines other than law, in particular economics. In stark contrast to traditional company law, corporate governance, as it is presently studied and practised, is essentially international and interdisciplinary. It follows that comparative company law today is to a considerable degree part of comparative

1 Detlev Vagts (ed), 'Business and Private Organizations', in International Encyclopedia of Comparative Law (vol XIII, Tübingen, Dordrecht, 1972 ff) with more than a dozen instalments.

2 Cf. among others Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus J. Hopt, Hideki Kanda, Edward Rock, *The Anatomy of Corporate Law, A Comparative and Functional Approach* (2d ed., Oxford 2004), 3d ed. with additional authors 2017 (n 72).

corporate governance,[3] though casebooks and case-based books on corporate law are now available.[4]

In view of this, it should be made clear at the outset that, as a part of a handbook on comparative law, this chapter focuses on law and related rulemaking and does not purport to cover the voluminous research on corporate governance,[5] let alone the contributions to it in economics, sociology, and, most recently, other disciplines such as behavioural sciences and psychology. Furthermore, this chapter cannot and will not attempt to survey company law and comparative company law work in an unlimited number of jurisdictions. Instead, it tries at least to touch upon—more cannot be done—the company law of five legal families[6] in an eclectic way.

II. Company Law and Comparative Law: Traditional and Modern Contacts

1. Some Remarks on the Development of Modern Company Law in Various Countries

(a) The Rise of the Modern Company

Comparative company law has as its clear focus the public corporation or company, that is, the company with shareholders who delegate management and control to the board. Legally speaking, such a company is characterized by legal personality, limited liability, and transferable shares. The public company is a phenomenon of the first half of the nineteenth century; its development was contemporaneous with the beginnings of industrialization. Of course, private companies or partnerships have existed much longer. They can be traced back to Roman law and even to earlier legal orders.[7] They have their own contractual forms, and the law dealt and still deals with them basically as bilateral or multilateral contracts. Accordingly, comparative law contributions on private companies are essentially part of

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3 Starting with Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch, and Stefan Prigge (eds), *Comparative Corporate Governance—The State of the Art and Emerging Research* (Oxford, 1998); more recently Andreas Fleckner and Klaus J. Hopt (eds.), *Comparative Corporate Governance, A Functional and International Analysis* (Cambridge, UK, 2013); Jean Jacques du Plessis, Anil Hargovan, Mirko Bagaric, Jason Harris (eds.), *Principles of contemporary corporate governance* (3d ed., Cambridge 2015). Cf. Ronald J. Gilson, 'From Corporate Law to Corporate Governance' (August 1, 2016), available at < http://ssrn.com/abstract=2819128 >

4 Marco Ventoruzzo, Pierre-Henri Conac, Gen Goto, Sebastian Mock, Mario Notari and Arad Reisberg, *Comparative Corporate Law* (American Casebook Series, St. Paul, MN, 2015); Mathias Siems and David Cabrelli, *Comparative Company Law – A Case-Based Approach* (Oxford and Portland, 2013).

5 Cf. Klaus J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation', *The American Journal of Comparative Law (AJCL)* 59 (2011) 1.

6 Namely Romanistic (France), Germanic (Germany and Switzerland), Anglo-American (United States and United Kingdom), Nordic, and East Asian (Japan and China) legal families, to use the terminology of Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (trans Tony Weir, 3rd edn, Oxford, 1998). This does not imply that their concept of legal families of the world is necessarily shared by the present author. As to the vivid modern controversies on the functional method in comparative law cf. eg James Gordley, 'Comparison, Law, and Culture: A Response to Pierre Legrand', *The American Journal of Comparative Law (ACJL)* 65 (2017) special issue 133-180.

7 Andreas M. Fleckner, *Antike Kapitalvereinigungen* (Cologne et al. 2010).

comparative contract law, though they certainly have their own unique problems,[8] and will not be dealt with here.

The first public company law is contained in the French *Code de commerce* of 1807.[9] Previously public companies were created by a special act of the state, which granted particular privileges to the individual company concerned. The French code marked the beginning of the general concession system. This allowed the companies to be formed according to general company law rules, although the permission of the state was still required. The French *Code de commerce* was the law in France as well as in Baden and the Prussian Rhine province, but the relevant point in the context of comparative company law is that it served as a model for all later European public company statutes. The first German public company statute was the Prussian Act of 1843, five years after the Prussian Act on railway enterprises of 1838. In respect of England, the Joint Stock Companies Act 1844 and the Limited Liability Act 1855 must be mentioned. Public companies boomed. Incorporation was popular in the railway industry, for mining, banking, and steamship businesses and for other early industrial enterprises. In the United States, company law was a matter of state law and has remained so until today, though in the 1930s it found its counterpart in federal securities regulation. In Japan, the Commercial Code (*Shôhô*), which contains most of Japanese corporate law, dates back to 1899.

The two main problems of public companies were soon to appear: scandals, fraud, and the breakdown of companies showed the need for investor protection by company law; and the consequences of such failures for creditors, the economy, and the state were a matter of general concern. So it quickly became clear that public company law had two goals: the protection of persons, either individually or as a class, and the protection of the public interest. Today these two goals still usually go together as two sides of the same coin, though as to the legal goal of corporations there is still the transatlantic cleavage between the US concept of maximizing shareholder profit and the more pluralistic European concept that includes the interests of labour and other stakeholders, though with various nuances such as those seen in Germany and the UK.[10] The great company law codifications of the second half of the nineteenth century in the Western industrialized countries—the English Companies Act of 1862, the French *Loi sur les Sociétés* of 1867, and the German company reforms of 1861, 1870, and 1884—tried to cope with these problems in more detail, but did not find lasting solutions. The story of company law since then has been one of continual reform.

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8 cf Joseph A. McCahery, Theo Raaijmakers, and Erik P. M. Vermeulen (eds), *The Governance of Close Corporations and Partnerships, US and European Perspectives* (Oxford, 2004); Stefan Grundmann, Florian Möslein, Karl Riesenhuber, eds., *Contract Governance, Dimensions in Law & Interdisciplinary Research,* Oxford 2015.

9 As to the history of company law, cf Karl Lehmann, *Die geschichtliche Entwicklung des Aktienrechts bis zum Code de Commerce* (Berlin, 1895); Norbert Horn and Jürgen Kocka (eds.), *Recht und Entwicklung der Großunternehmen im 19. und frühen 20. Jahrhundert (Law and the Formation of the Big Enterprises in the 19th and Early 20th Centuries)* (Göttingen, 1979); Paul Frentrop, *A History of Corporate Governance 1602–2002* (Brussels *et al*, 2003); Klaus J. Hopt, 'Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Börsenrechtsentwicklung im 19. Jahrhundert', in Helmut Coing and Walter Wilhelm (eds), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol V: *Geld und Banken* (Frankfurt, 1980), 128–68.

10 Below, Section III.1.(c).

In the early days of company law, both in Europe and in the United States, the problems created by concentration, monopolization, and the undue power of large companies were still dealt with within the boundaries of company law. Later they were addressed by separate anti-trust legislation. The United States was a forerunner in this field, but other countries followed, some nearly a century later.[11] Legal and doctrinal links between company law and anti-trust law still exist, but, in distinction to company law, there is a well-developed comparative anti-trust law having strong interrelations with economics. Most recently there is a tension between anti-trust law and the more traditional law of corporate groups (in its German version "Konzernrecht"). Whereas under the former a parent is held liable for acts of its subsidiaries, as decided for example in case law of the European Court of Justice, the latter generally refuses to pierce the veil between parent companies and subsidiaries and prescribes liability only for fault. The original focus of company law was protection of the general shareholding public. Only later did the focus broaden to include investors and investor protection. It was only in the 1930s, and again in the United States, that securities regulation or—as it is more usually called in Europe—capital market law became the subject of specific acts and developed into a field of its own, as will be shown later.[12]

(b) The Need For, and the Modern Development of, Company Law

While the need for investor protection was felt right from the beginning of company law, it was not until much later that this was subjected to conceptual analysis. This was Berle and Means's famous 'discovery' in 1932 of the separation of ownership and control in the modern public limited company. This phenomenon still reflects the reality of American companies today. Modern economic theory has developed the principal-agent problem as its basic question, namely, how company law can make the board more responsive to shareholder interests. Modern company law reform initiatives in all industrialized countries have tried to address this problem. These reforms have not usually affected the fundamental structure of the board. The one-tier or two-tier board, as it emerged over the years in the various countries, has been maintained, although today in Italy, France, and the emerging European company law (amongst this its "flagship", the Societas Europaea) there is a tendency towards giving companies a choice between these alternatives. Instead, reforms have dealt with concrete issues such as the size of the board, the business judgment rule, independent directors, conflicts of interest, board committees, the frequency and efficiency of board meetings, information of the board and its relation to the auditors, back office, and the remuneration and liability of directors.[13] One key problem is finding the right balance between, at one pole, broad deference to the business judgment of directors and, at the other, ensuring control over directors through structural requirements, legal rules, and, ultimately, liability.

In Continental European company laws, the primary principal-agent conflict is not so much the conflict between shareholders and the board of directors, but rather the conflict between minority shareholders and the majority shareholder. This reflects the different prevailing

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11 As to the history of competition law, cf Helmut Coing and Walter Wilhelm (eds), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahnrhundert* (vol IV, Frankfurt, 1979).

12 Below, Section III.1.

13 Paul Davies, Klaus J. Hopt, Richard Nowak, Gerard van Solinge (eds.), *Corporate Boards in Law and Practice, A Comparative Analysis in Europe* (Oxford, 2013).

patterns of stock ownership and control structures in the United States and Great Britain on the one hand and, broadly speaking, in Continental European states on the other.[14] Accordingly, two general types of corporate governance systems have been distinguished: insider and outsider systems. In the United States and Great Britain, neither individual shareholders nor institutions hold a large proportion of shares in the company. On the Continent, however, shareholding is highly concentrated in the hands of families or other companies (the group phenomenon).[15] In Germany and some other countries, the universal banks—as distinguished from investment banks and insurance companies—played a considerable role in this, though the so-called bank-based system has been fading away.[16] Even reciprocal and cross-shareholdings have been frequent. In such companies, the board is sometimes just the puppet of the controlling shareholder or the parent. European company laws respond to this, if at all, by various measures of minority rights, minority protection, and group law provisions. There are large differences between the levels of protection afforded in different countries to investors, be they shareholders or creditors. Both the legal provisions and the effectiveness of their enforcement vary. As will be mentioned later, a recent though not undisputed theory holds these differences to be an important factor for the capital markets and, ultimately, for the economies of the various countries.[17]

2. Looking across the Border in Company Law: Legislators, Lawyers, Academics, Judges and Regulators

(a) Legislators

One important aim of comparative law is the mutual understanding of other people and nations. But this serves not only altruistic purposes. Comparative law has always been considered to be an enrichment of the 'stock of legal solutions' and a wealth of actual experience. Some speak of an *école de verité*, some even of real 'social science experiments'. The legislators in the nineteenth and early twentieth centuries were already demonstrating this when they prepared their company law statutes on the basis of thorough comparisons of the laws and experiences of other countries. The major company law codifications in the second half of the nineteenth century, when European countries moved away from the state concession system, testify to this. Before the German Company Act of 1937 was drafted, many preparatory comparative law opinions were commissioned from the Kaiser Wilhelm Institute in Berlin, the predecessor of today's Max Planck Institute in Hamburg. One of the most impressive opinions dealing with American and English company law was written by Walter Hallstein while he was still an assistant at the Institute in Berlin and *Referendar* (legal

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14 Rafael La Porta, Florencio Lopez-De-Silanes, and Andrei Shleifer, 'Corporate Ownership Around the World', (1999) LIV *The Journal of Finance* 471. Most recently Julian Franks and Colin Mayer, 'Evolution of Ownership and Control Around the World: The Changing Face of Capitalism', European Corporate Governance Institute, ECGI Finance Working Paper No 503/2017.

15 Cf. Fabrizio Barca and Marco Becht (eds.), *The Control of Corporate Europe* (Oxford, 2001).

16 Wolf-Georg Ringe, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG', *The American Journal of Comparative Law (AJCL)* 63 (2015) 493.

17 Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer, and Robert W. Vishny, 'Investor Protection and Corporate Governance', (2000) 58 *The Journal of Financial Economics* 3; Fabrizio Barca and Marco Becht (eds.), *The Control of Corporate Europe* (Oxford, 2001).

trainee) at the Berlin Court of Appeals, the *Kammergericht*.[18] Hallsein would later become the president of the European Commission.

In the United States, where company law is state law, the use of comparative company law by the legislators is common in so far as one state will take into account the company laws of other American states when reforming its own company law. Delaware has taken the lead since it became, and remains, the major incorporation state for American companies. The competition of state company legislators in company law is a well-known and, until recently,[19] largely indisputable phenomenon. Yet its interpretation as a 'race to the bottom' or a 'race to the top' is highly controversial, and the precise reasons for Delaware's leading position—be it its company law, or rather its company lawyers and specialized courts—remain disputed.[20]

Merely learning from foreign company laws is one thing. More or less adopting them either voluntarily or under moral suasion or even pressure is another. Japan[21] is one of many examples, China another, although for policy and cultural reasons its position is different in important respects.[22] More recently the same can be seen in many of the Central and Eastern European countries which, following the collapse of the Soviet Union, reformed their company laws with the aim, sooner or later, of joining the European Union.[23] In this context it is also important to mention the American influence on these countries, particularly strategic ones such as Russia and certain former states of the Soviet Union, which is sometimes secured with the help of financial promises.[24] The Japanese company law of 1893 (*Kyû-shôhô*) was based to a significant extent on a draft by the German scholar Carl Friedrich Hermann Roesler and combined elements of the French *Code de commerce* (mainly as to its

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18 Walter Hallstein, *Die Aktienrechte der Gegenwart: Gesetze und Entwürfe in rechtsvergleichender Darstellung* (Berlin, 1931); Rolf-Ulrich Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945* (Göttingen, 2004), 135 ff, 137 ff.

19 As to the vertical competition between the American states and the federal government, see Marcel Kahan and Ehud Kamar, 'The Myth of State Competition in Corporate Law', (2002) 55 *Stanford LR* 679; Lucian Bebchuk and Assaf Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters', (2002) 112 *Yale LJ* 553.

20 Mark J. Roe, 'Delaware's Competition', (2003) 117 *Harvard LR* 588 and many other participants in the discussion.

21 See Harald Baum and Eiji Takahashi, 'Commercial and Corporate Law in Japan: Legal and Economic Developments after 1868', in Wilhelm Röhl (ed), *History of Law in Japan since 1868* (Leiden, Boston, 2005), 331, 355 ff, 392 ff; Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford, 2005).

22 cf I. A. Tokley and Tina Rvan, *Companies and Securities Law in China, Hong Kong & Singapore* (Hong Kong, 1998); Philip Comberg, *Die Organisationsverfassung der Aktiengesellschaft in China* (Hamburg, 2000); Jiangyu Wang, Company law in China (Cheltenham 2014); earlier Frank Münzel, *Unternehmens- und Gesellschaftsrecht der VR China* (Hamburg, 1989). Most recently Holger Fleischer, Hideki Kanda, Geon sig Gim and Peter O. Mülbert (eds.), *German and Asian Perspectives on Company Law* (Tuebingen 2016).

23 See eg Klaus J. Hopt and Katharina Pistor, 'Company Groups in Transition Economies: A Case for Regulatory Intervention?', (2001) 2 *European Business Organization LR* 1; also Klaus J. Hopt, Christa Jessel-Holst, and Katharina Pistor (eds), *Unternehmensgruppen in mittel- und osteuropäischen Ländern* (Tübingen, 2003).

24 Cf several contributions to Ulrich Drobnig, Klaus J. Hopt, Hein Kötz, and Ernst-Joachim Mestmäcker (eds.), *Systemtransformation in Mittel-und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten* (Tübingen, 1998), in particular by Richard M. Buxbaum from the point of view of the United States and by Stanislaw Soltysinski with a view from Warsaw.

form) and of the German *Allgemeines Deutsches Handelsgesetzbuch* of 1861 (concerning many substantive principles). The later company law of 1899 (*Shôhô*) was close to the German company law revision of 1870 in its revised form of 1884, and the revised *Shôhô* of 1938 was closely modelled on the German Stock Corporation Act of 1937. After World War II, Japanese company law reform closely followed United States company law principles, in particular the Illinois Business Corporation Act of 1933. This was because the relevant American official of the Supreme Commander for the Allied Powers (SCAP) happened to come from Chicago. Such historical coincidences happen more often than is generally known, and this is also true in company law. Modern Japanese company law reform, some of which is being carried out at present, is based on extensive comparison of both United States and European company laws.[25]

Most recently there has been renewed interest in comparative company law, partly because of the emergence of European company law and partly because the corporate governance movement has sharpened the sense of competition with other countries. The German ministries of justice and finance, for example, have commissioned several comparative law studies from, amongst others, the Max Planck Institute when preparing their reform on highly controversial questions such as whether to make directors liable to investors for untrue or misleading financial statements.[26]

(b) Lawyers and Legal Counsel

The role of lawyers and legal counsel in comparative company law is traditionally underrated, since they do their work for their clients and enterprises on a day-to-day basis. Yet they are the real experts in both conflict of company laws and of foreign company laws. This is even more true now that the forces of globalization have also reached law firms, with the consequence that the top layer of firms in all major countries has become international either by merger or by cooperation. Occasionally some of their comparative work is published, often only in the form of practical advice, but sometimes also with fully legitimate academic claims. The creation of companies abroad and their subsequent control is common practice today. Working out the best company and tax law structures for international mergers, and forming and doing legal work for groups and tax haven operations, is a high, creative art. In the meantime comparative tax law has become an international field of study and research.[27]

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25 See eg Hiroshi Oda, 'The "Americanization" of Japanese Corporate Law?', (2005) 69 *RabelsZ* 47; Hatsuru Morita, 'Reforms of Japanese Corporate Law and Political Environment', (2014) *Zeitschrift für Japanisches Recht/Journal of Japanese Law)* 25; Harald Baum, 'Zur Diskussion über vergleichende Corporate Governance mit Japan', (1998) 62 *RabelsZ* 739; Hiroyuki Kansaku and Moritz Bälz, 'Gesellschaftsrecht', in Harald Baum and Moritz Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Cologne 2011, § 3).

26 For example Klaus. J. Hopt and H.-C. Voigt (eds), *Prospekt- und Kapitalmarktinformationshaftung—Recht und Reform in der Europäischen Union, der Schweiz und den USA* (Tübingen, 2005). See also, as to stock exchange law reform, Klaus J. Hopt, Bernd Rudolph, and Harald Baum (eds.), *Börsenreform—Eine ökonomische, rechtsvergleichende und rechtspolitische Untersuchung* (Stuttgart, 1997).

27 Cf. the work of the Munich Max Planck Institute for Tax Law and Public Finance. Established in Munich in 2011, the Institute performs fundamental legal and economic research under its directors Wolfgang Schön and Kai Konrad. Cf. Wolfgang Schön, 'Tax Law Scholarship in Germany and in the United

Much more in the public eye is the comparative company law work of the American Law Institute, aimed at drafting uniform company laws and model codes. Notable results are the Principles of Corporate Governance: Analysis and Recommendations of 1992 (2 vols, 1994) and the Federal Securities Code of 1978 (2 vols, 1980). The Principles were influential also abroad, and a revised edition would be a great feat benefitting corporate law well beyond the USA.

(c) Academia

As stated above, traditionally only a few have engaged in comparative company law work. In all industrialized countries with well-developed companies there are, of course, standard company law treatises, many of them highly elaborated and some at the peak of traditional doctrinal wisdom. Yet, what is conspicuous about most of these leading texts is their restriction to national law and practice. This is certainly the impression for Germany[28] and France,[29] and to a lesser degree the United Kingdom,[30] but also for smaller countries where looking beyond one's borders has always been more natural, such as Switzerland.[31] Exceptions seem to prove the rule, but even these exceptions are usually confined to areas such as conflict of company laws, that is, national law, and, more recently, of course, to European Union company law, or to the occasional use of foreign literature in a general text along with comparative observations.[32] Comparative company law work is rarely addressed in these leading texts as a prerequisite of European company law harmonization or as a means to provide a better understanding, and to aid the development, of one's own national company law.[33]

Of course, the state of comparative company law is different as far as more specialized monographs and articles are concerned. It is impossible to go into detail here; it would not only be futile, but also unjust to the many works which could not be mentioned. Some more general observations must suffice. First, of course, there is much comparative company law work in the contexts of conflict of laws and, more recently, European company law.[34] Of late, impressive treatises on European company law (and corporate governance) have been

States', available at: https://ssrn.com/abstract=2775191, an article that also explores differences well outside the sphere of tax law.

28 Karsten Schmidt, *Gesellschaftsrecht* (4th edn, Cologne *et al*, 2002).

29 Maurice Cozian, Alain Viandier, and Florence Deboissy, *Droit des sociétés* (30th edn, Paris, 2017).

30 Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (10th edn, London, 2016). Paul Davies is an accomplished comparativist and a member of the Anatomy group (see below n 74).

31 Peter Böckli, *Schweizer Aktienrecht* (4th edn, Zurich *et al*, 2009). Peter Böckli is the Swiss expert on comparative corporate governance.

32 Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, 1997, paper reprint 2004) ch 9; Friedrich Kübler and Heinz-Dieter Assmann, *Gesellschaftsrecht* (6th edn, Heidelberg, 2006), §§ 34, 35; Herbert Wiedemann, *Gesellschaftsrecht* (vol I, Munich, 1980), §§ 14, 15.

33 But see eg the brief comments in Christine Windbichler, *Gesellschaftsrecht* (24th edn, Munich, 2017). These comments are even more remarkable since this book is the standard company law text for students; but it is to be explained by the marked comparative law interest of the author.

34 See eg Marcus Lutter, Walter Bayer, Jessica Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht* (5th edn, Berlin, New York, 2012.

developed in many member states, appearing not only in native languages but more recently also in English as penned by non-English authors.[35]

Second, in many countries American company law has had a considerable influence on legal literature.[36] This is not surprising for those countries mentioned above where American company law and securities regulation was broadly followed. But similar trends can be discerned, for example, in Germany after World War II, where contacts with German émigrés were rekindled and whole generations of young academics studied in the United States and wrote their doctoral theses and their *Habilitationen* on comparative American and German company law. Some of these works happened to stand at the beginning of the development of whole new areas in their respective national laws.[37] At a later stage there were even treatises and handbooks on American company law written by non-Americans in German and other languages, which provided much insight into its peculiarities.[38]

Third, the influence of international networks has been important for comparative company law. Some examples of organized efforts include the *International Encyclopedia of Comparative Law*,[39] the work of international institutions such as the International Faculty of Corporate Law and Securities Regulation[40] and the International Academy of Comparative Law,[41] or the research which was facilitated by international institutions such as the European University Institute in Florence, where comparative work on groups of companies, corporate governance, directors' liabilities, and the harmonization of companies was done and the so-

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35 See for example Stefan Grundmann, *European Company Law–Organization, Finance and Capital Markets* (2d ed., Cambridge, Antwerp, Portland, 2012) with a previous edition in German; Francis Gore-Browne and Carsten Gerner-Beuerle (eds.), *Gore-Browne on EU company law* (Bristol, loose-leaf); see also p Adriaan Dorresteijn, Tiago Monteiro, Christoph Teichmann and Erik Werlauff, *European Corporate Law* (2d ed., Alphen aan den Rijn, 2009); Mathias Habersack and Dirk A. Verse, *Europäisches Gesellschaftsrecht* (4th edn., Munich, 2011); Véronique Magnier, *Comparative corporate governance* (Cheltenham, 2017); Michel Menjucq, *Droit international et européen des sociétés* (4th ed., Paris, 2016); Christoph Teichmann, *Europäisches Gesellschaftsrecht,* Berlin 2013; Christian W. A. Timmermans, *Company Law as Ius Commune* (Leuven, 2002); Verica Trstenjak, *Evropsko pravo gospodarskih družb, European company law* (Ljubljana 2004); Erik Werlauff, *EU -company Law: Common Business Law of 28 States* (2d ed., Copenhagen, 2003).

36 See the monumental monograph by Jan von Hein, Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland (Tübingen 2008).

37 eg for the German law of groups, later codified in the Stock Corporation Act of 1965, Ernst-Joachim Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre* (Karlsruhe, 1958). As to investor protection and securities regulation, which in Germany was not codified until the 1990s, cf Klaus J. Hopt, *Der Kapitalanlegerschutz im Recht der Banken* (Munich, 1975); for Austria Susanne Kalss, *Der Anleger im Handlungsdreieck von Vertrag, Verband und Markt* (Vienna, 2001).

38 eg Hanno Merkt, *US-amerikanisches Gesellschaftsrecht* (3d edn., Frankfurt am Main, 2013).).

39 Above (n 1).

40 This was a private initiative by Robert H. Mundheim and others, at that time based at the University of Pennsylvania. The faculty combined persons from the United States, Europe, Japan, Latin America, and later also Australia, some of them academics, others practitioners. It edited a comparative law journal in the field: *Journal of Comparative Business and Capital Market Law*, later integrated in the *University of Pennsylvania Journal of International Economic Law*. Apart from this, the group did not come up with its own books or articles due to the diversity of participants and interests. It led to a separate offspring in which Reinier R. Kraakman from Harvard and Gérard Hertig from the ETH Zurich were particularly active in bringing together the *Anatomy of Corporate Law* book (below, n 74).

41 Evanghelos Perakis (ed), *Rights of Minority Shareholders* (Brussels, 2004) originating in the Sixteenth Congress of the International Academy of Comparative Law in Brisbane, 2002; Fleckner and Hopt (n. 3).

called green book series was started.[42] Other such networks resulted from private initiatives, for example between the United States, Germany, and Switzerland;[43] Germany and Belgium;[44] Italy and the United States;[45] or within Scandinavia.[46]

Fourth, the law and economics movement in the United States and abroad led to a new and increased interest in comparative company law. This will be dealt with in more detail below.

Fifth, this new interest in comparative company law was not only permanently covered by a few national company law reviews such as the German *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR), the Italian *Rivista delle Società*, and to a certain degree also the French *Revue des Sociétés*; rather, a number of new specialized law reviews also appeared on the market, such as the English *International and Comparative Corporate Law Journal* (*ICCLJ*), which seemed to have made way for the *Journal of Corporate Law Studies* (*JCLS*), the Dutch *European Business Organization Law Review* (*EBOR*), the initially German and now internationally based *European Company and Financial Law Review* (*ECFR*), and the *European Company Law* (*ECL*), published jointly by the Universities of Leiden, Utrecht, and Maastricht.

In view of the golden age of the elaboration of common principles of law such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law, it is astonishing that a similarly successful work was undertaken in the area of company law only in 2017 when the final version of the European Model Company Acts (EMCA) was presented in Rome.[47]

(d) Courts and Regulators

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42 This was the first series in its field to be published in Germany in English. See eg Klaus J. Hopt (ed), *Groups of Companies in European Laws: Legal and Economic Analyses on Multinational Enterprises (Berlin, New York, 1982); Klaus J. Hopt and Gunther Teubner (eds), Corporate Governance and Directors' Liabilities—Legal, Economic and Sociological Analyses on Corporate Social Responsibility* (Berlin, New York, 1985).

43 Richard M. Buxbaum and Klaus J. Hopt, *Legal Harmonization and the Business Enterprise—Corporate and Capital Market Law Harmonization Policy in Europe and the USA* (Berlin, New York, 1988); Richard M. Buxbaum, Gérard Hertig, Alain Hirsch, and Klaus J. Hopt (eds), *European Business Law* (Berlin, New York, 1991) and *idem, European Economic and Business Law* (Berlin, New York, 1996), both dealing, as their subtitles show, with *Legal and Economic Analyses on Integration and Harmonization*; see also Baums *et al* (below, n 104).

44 Cf the series of books edited by Klaus J. Hopt and Eddy Wymeersch, starting with two books in the early 1990s: *European Insider Dealing* (London, 1991) and *European Takeovers* (London, 1992), later followed by *Comparative Corporate Governance, Essays and Materials* (Berlin, New York, 1997) and several books with Oxford University Press and Cambridge University Press from 1998 onwards.

45 Arthur R. Pinto and Gustavo Visentini (eds), *The Legal Basis of Corporate Governance in Publicly Held Corporations* (The Hague *et al*, 1998). See now Sabrina Bruno, Eugenio Ruggiero (eds.), *Public Companies and the Role of Shareholders* (Alphen aan den Rijn, 2011), covering more countries.

46 Mats Isaksson and Rolf Skog (eds), *The Future of Corporate Governance* (Stockholm, 2004); Peter Wahlgren (ed), 'Company Law', (2003) 45 *Scandinavian Studies in Law*; Mette Neville (ed.), *The Regulation of Companies* (Copenhagen, 2003). See also the comparison of German and English corporate governance by a Finnish author: Petri Mäntysaari, *Comparative Corporate Governance: Shareholders as a Rule-maker* (Berlin *et al*, 2005).

47 See Jessica Schmidt, 'Der European Model Company Act (EMCA)', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)* 181 (2017) 43.

In nearly all countries it is the courts which have been particularly reluctant to look to comparative company law. There are some obvious exceptions. It is clear that United States court decisions on company law do not only deal with the company law of the respective state, but also with precedents from other states of the Union. The same was and still is true, though to a much lesser degree, within the former Commonwealth. Apart from these instances, it is the courts of smaller countries, such as Switzerland, which are more likely to take foreign decisions into consideration. This is because the academics and lawyers in such countries are generally more open to looking to the wealth of experience in their larger neighbouring states. But even then the fact that they look abroad rarely results in the actual citation of foreign company law in court decisions themselves. One reason for this may be the traditional theory in Continental Europe that judges simply 'find the law' as enacted by the legislature. This, of course, is not true, as is shown very clearly by many cases decided by the Second Senate of the German Federal Supreme Court, which is responsible for disputes in company law.

A similar observation can be made for the European Court of Justice. Ninon Colneric, a former German Justice on that Court, remarked that comparative law plays a much higher role in the decision-making of the Court than one might assume from reading its decisions.[48] The fact that the Court does not cite literature does not mean that it does not take legal literature into consideration. Quite the contrary is true: sometimes even special research notes on the treatment of a legal question in the member states are commissioned by the Court. Of course, the European Court of Justice is special due to its nature and jurisdiction; it needs to consider not only the law of the member state concerned in a specific case, but more broadly the acceptability of its decision in all member states.[49]

While company law has long been the domain of national courts in the EU, this is no longer true. The European Court of Justice has rendered quite a number of important decisions in the fields of company law and accounting. For a long time, national courts were rather reluctant to refer questions concerning harmonized company law and accounting to the European Court of Justice. In the meantime, however, the relationship between the judiciaries has become more relaxed. One of the landmark cases in company law and conflict of company laws was the 1999 *Centros* decision of the European Court of Justice.[50] Combined with the decisions in the subsequent cases of *Überseering, Inspire Art*, *Sevic, Cartesio* and in 2012 *Vale*, this marked an end, at least within the European Union, to the seat theory that had been so dear to German lawyers for so long. These cases allow free incorporation in any of the EU member states, which has binding effects in all member states under the incorporation theory.

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48 Ninon Colneric, 'Auslegung des Gemeinschaftsrechts und gemeinschaftskonforme Auslegung', (2005) 13 *Zeitschrift für Europäisches Privatrecht* 225, 229.

49 Cf the President of the European Court, Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', (2003) 52 *ICLQ* 873, 898: 'Taking into account the observations made by the Member States whose law is in issue as well as those submitted by other Member States and the Commission, the Court will "gauge the temperature" of the national legal systems in order to ascertain the credibility and "acceptability" of its decision for the whole of the Community'. This observation is cited and shared by Colneric, (2005) 13 *Zeitschrift für Europäisches Privatrecht* 225.

50 Case C–212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I–1459. In the meantime there has been a host of comments on this decision, mostly in Germany.

It may be surprising that regulators are mentioned in this context since in general corporations, unlike banks and other regulated industries, are private undertakings that are not regulated in a Western market economy. While this is formally true, the influence of securities and capital market regulators on listed corporations is considerable. This is even more true for bank corporations.[51]

In concluding this section, it should be mentioned that, according to some observers, the real impetus toward comparative company law is provided by the forces of financial and other markets, with their scandals; the needs of these markets do not stop at national frontiers. Although true to a considerable extent, this is not the whole story. Comparative company law is conceived, practised, and reformed by persons such as those dealt with in this section. Their actions and reactions depend on many influences, not only on market forces. Yet the observation that company law reforms, like many others, are driven by scandals (and therefore often come too late and overreact) can be verified throughout the history of company law and investor protection; this dynamic has been seen not only in the Enron scandal[52] and the later financial crisis of 2008,[53] but also in the shock waves which subsequently coursed through company law in the United States and abroad.

3. Harmonization of Company Law in the European Union

(a) A Glance at the Development of European Company Law

It is well known that comparative law often precedes the convergence and harmonization of laws, though of course this does not imply that there is a causal relationship between the two. In convergence processes that are usually driven by market forces, as in political harmonization efforts, the interest in, and even the need for, comparative research is obvious. This is also true for comparative company law, as the example of European company law shows. This has a long and painful history, with many ups and downs that will not be described here. Suffice it to say that by now there is an impressive body of European company law, consisting mostly of directives, but also of some regulations and recommendations. It covers diverse company law matters such as transparency, legal capital, mergers, annual accounts, splitting up, consolidated accounts, statutory audits, legal branches, auditors' independence, and international accounting standards. Furthermore, truly European forms of companies such as the European Company (*Societas Europaea*) and the European Economic Interest Grouping are now available alongside national company law forms. Yet the member states agreed to this only reluctantly; they wanted to avoid too much European

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51 More on this below, Section III.1.(b) and (c) and Section IV.2.

52 Cf. John Armour and Joseph A. McCahery (eds.), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Oxford, 2006); John C. Coffee, Jr, 'A Theory of Corporate Scandals: Why the USA and Europe Differ', (2005) 21 *Oxford Review of Economic Policy* 198; Klaus J. Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron', *Journal of Corporate Law Studies* 3 (2003) 221; see also the fundamental critique by Roberta Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', (2005) 114 *Yale LJ* 1521. Most recently from a public interest view Luzi Hail, Ahmed Tahoun, Clare Wan, 'Corporate Scandals and Regulation', ECGI Law Working Paper No 367/2017.

53 Cf. Eilís Ferran, Niamh Moloney, Jennifer G. Hill, John C. Coffee, Jr., *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge, 2012); Eddy Wymeersch, Klaus J. Hopt, Guido Ferrarini (eds.), *Financial Regulation and Supervision, A Post-Crisis Analysis* (Oxford, 2012).

competition with their own corporate forms. Unfortunately, they were rather successful in their opposition, certainly in respect of the European Economic Interest Grouping, though less so as to the *Societas Europaea*, at least in Germany, where this legal company form helps to mitigate labour co-determination.

Ever since the beginning of European company law harmonization, member state academia and practitioners have followed this process closely and have sometimes helped to prepare it. In the early stages, the European Commission even commissioned comparative law studies for its work, although later the practice disappeared, probably due to financial restraints and a greater orientation on member state pressure as brought by ministries, politicians, and lobbyists. On some later occasions, economic studies were also sought, in particular as to takeover and capital market law. The original euphoria of full harmonization that had also loomed in company law disappeared slowly when its real difficulties came to light. Such scepticism—or rather a more realistic view—had been expressed at an early stage on the basis of a comparison between European and United States law.[54]

Unfortunately the attitude of member states to the harmonization process is often to ask which national law has had the greatest impact on certain parts of European company law harmonization. For example, European insiders can tell enlightening stories of the early influence which German law had in the harmonization process because, at that time, the German company law codification of 1965 was the most modern; also, the Directorate General III was initially firmly in German hands. This has changed over time; finally Directorate General XV 'Financial Instruments and Taxes' took over and the momentum switched from company law to capital markets and financial law, in which the British and French took the lead. From a substantive comparative company law point of view, two examples of the self-inflicted dwindling German influence may be given: group law, where Germany followed an overly inflexible and perfectionist route, and insider and takeover law, which seemed unacceptable to German industry, banks, and traditional academia until it was rightly forced on them as an international standard by European directives from the late 1980s onwards.

The difficulties and challenges of European company law harmonization may be illustrated by two early examples that made use of extensive comparative company law work: the Forum Europaeum Group Law (below, subsection (b)) and the Company Law Action Plan of the European Commission (below, subsection (c)).

(b) European Law of Groups, Forum Europaeum Konzernrecht *and Later Academic Harmonization Efforts*

In most countries, the existence of groups of companies has not given rise to a specifically codified law of groups. The German Stock Corporation Act of 1965 was the first to codify a law of groups for dependent stock corporations.[55] Later on, similar rules were developed by German courts for limited liability companies and commercial partnerships. Some EU

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54 Buxbaum and Hopt, *Legal Harmonisation and the Business Enterprise* (n 43).

55 A critical description of the group law in the German 1965 Stock Corporation Act, which is still valid today, is given by Herbert Wiedemann, 'The German Experience with the Law of Affiliated Enterprises', in Hopt, *Groups of Companies in European Laws* (n 42), 21.

countries, including Portugal and Croatia, and some non-EU states, such as Brazil, have followed the example of the German codification. Early attempts to do the same at the EU level, such as the pre-draft of the Ninth Directive, failed. This is not to say that there is no law of groups in other countries. Upon closer examination there is an extensive group law in many European member states and even in the United States,[56] although it is found in specific fields—such as bank and insurance supervision, labour law, and, of course, tax law—rather than in general company law.[57] In addition, there is a considerable body of case law in respect of limited liability companies. But the approach in these jurisdictions is different. There is no coherent body of specific group law provisions; instead, the controlling shareholder has specific duties towards the minority shareholders, and the respective rules apply to shareholders both of independent companies and of companies in a group. Furthermore, it is clear that these rules are less rigid, and designed more to solve specific practical problems in various areas, than those contained in the German codification. It is not surprising, therefore, that the German example did not appear very attractive in most other member states of the EU. The development of European rules for groups of companies stalled, while German courts and writers stood firmly by their rules. After all, they had put considerable energy into their development, both in case law and legal scholarship German practice seemed to have made its peace with these rules.

In this situation, a number of company law specialists from various countries combined forces to tackle the problem again. The cooperative effort of academics, legislators, and practitioners led to the elaboration of a set of principles and proposals for a European corporate group law.[58] These principles were elaborated by the *Forum Europaeum Konzernrecht* (Group Law). The starting-point was the indisputable observation that the existence of company groups had long been an economic reality everywhere. To cope with this, framework rules by both European and national legislatures were considered necessary. While full harmonization of group law within the EU is neither feasible nor advisable, the European single market can hardly do without a certain degree of uniformity concerning the rules of the game (not necessarily a full 'level legal playing field'). Rules proposed by the *Forum Europaeum* include disclosure, legal recognition of group management under certain safeguard conditions, special investigation covering the independent company but extending also to the group, mandatory bids, buy-out and withdrawal rights, and, ultimately, liability for wrongful trading. The rules are conceived as building blocks of a European law of groups that can be adopted separately and flexibly according to the needs felt and the political acceptability in Europe and individual member states. These proposals have attracted considerable attention in many European countries and even as far away as Japan.

More recently, further efforts to convince the European Commission to regulate core principles for groups of companies have been made; worthy of mention here is the work of

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56 See the 5-vol loose-leaf work by Phillip I. Blumberg, Kurt A. Strasser, Nicholas L. Georgakopoulos, and Eric J. Gowin (eds), *Blumberg on Corporate Groups* (2nd edn, Aspen, 2005).

57 See Klaus J. Hopt, '*Konzernrecht: Die europäische Perspektive*' (2007) 171 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 199, 204.

58 Forum Europaeum Konzernrecht, Corporate Group Law for Europe (Stockholm, 2000); also in (2000) 1 *European Business Organization LR* 165. The work has also been published in German, French, Spanish, Italian, and Japanese law reviews.

the Reflection Group on the Future of EU Company Law,[59] the Informal Group of Company Law Experts,[60] the Forum Europaeum on Company Groups[61] and the European Company Law Experts (ECLE).[62] The first two groups have been convened by the European Commission; the last two are private groups on company law and consist of academics. The chances that the European Commission would take action seemed reasonable, but then Brexit interfered and brought completely new, complex, and more urgent challenges.[63] In this light the pursuit of completing the European Banking Union and furthering the European Capital Market Union are rightly at the forefront of the ongoing European regulatory efforts. For the purposes of this study, instead of going into the details of the proposals of these four groups and analysing their respective merits or shortcomings, it must suffice to mention two studies that reflect on the issue of groups and their regulation.[64]

(c) The Company Law Action Plan of the European Commission and Further Developments

The second example is the Company Law Action Plan of the European Commission of May 2003.[65] Though only parts of this plan have been realized, this document remains revealing since it sets out a comprehensive plan regarding what European company law should contain and what should be left to the member states. From a comparative company law perspective, the Action Plan is remarkable for at least three reasons: its origin, its content, and its reception.

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59 Reflection Group on the Future of EU Company Law, Final Report, April 2011, ch. 4 p 59 et seq (Groups of Companies).

60 Informal Company Law Expert Group, Report on Information of Groups, Reporter: Martin Winner, March 2016; *idem*, Report on the Recognition of the Group Interest, Reporter: Pierre-Henri Conac, October 2016.

61 Forum European on Company Groups, 'Proposal to Facilitate the Management of Cross-Border Company Groups in Europe', European Company and Financial Law Review (ECFR) 2015, 299.

62 European Company Law Experts (ECLE), 'A Proposal for the Reform of Group Law in Europe', European Business Organization Law Review 18 (2017) 1.

63 Among many contributions see eg European Company Law Experts (ECLE), 'The consequences of Brexit for companies and company law', Rivista delle Società 62 (2017) 455-499 and Revue Trimestrielle de Droit Financier (RTDF) 2017 no. 1, 16-45; John Armour, Holger Fleischer, Vanessa Knapp and Martin Winner, Brexit and Corporate Citizenship, *European Business Organization Law Review* (2017) 225.

64 Klaus J. Hopt, 'Groups of Companies, A Comparative Study on the Economics, Law and Regulation of Corporate Groups', European Corporate Governance Institute (ECGI) Law Working Paper No. 286/2015 and < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560935 >; also in Jeffrey N. Gordon and Wolf-Georg Ringe, *The Oxford Handbook of Corporate Law and Governance* (Oxford, forthcoming 2018); Holger Fleischer, 'Europäisches Konzernrecht: Eine akteurzentrierte Annäherung', Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2017, 1.

65 European Commission, *Communication to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward*, 21 May 2003, COM (2003) 284 final. Cf Klaus J. Hopt, 'European Company Law and Corporate Governance: Where Does the Action Plan of the European Commission Lead?' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds), *Corporate Governance in Context—Corporations, States, and Markets in Europe, Japan and the US* (Oxford, 2005). 119; same, 'Corporate law, corporate governance and takeover law in the European Union: Stocktaking, reform problems and perspectives', (2007) 20 *Australian Journal of Corporate Law* 244. See generally Stefan Grundmann and Florian Möslein, *European Company Law – Organization, Finance and Capital Markets* (Antwerpen, Oxford, 2007).

The Action Plan is based on the work of the so-called High Level Group of Company Law Experts, which delivered two reports, one on company law reform[66] and another on takeover regulation.[67] The European Commission had set up this group in coordination with the European Parliament after the latter spectacularly voted down the Commission's draft Thirteenth Directive on takeovers. The group consisted of seven company law academics and practitioners from seven countries working under great time pressure but in complete freedom and in a fully comparative way.

As to the content of the Action Plan, which follows the recommendations of the High Level Group almost completely, six broad areas are covered: (1) corporate governance; (2) the raising and maintenance of legal capital; (3) groups of companies; (4) restructuring; (5) new European company forms, such as the European private company as well as other enterprise and foundation forms; and (6) transparency of national legal forms. The main concern of the Commission is certainly corporate governance. This is a remarkable shift from classical company law to corporate governance, though upon closer examination key company law problems have been tackled in the Action Plan in a functional, modern way.

All of these areas touch on core national company laws and idiosyncrasies. Therefore, it was inevitable that the proposed actions became subject to an intensive and critical comparative law debate in practice, politics, and amongst the legal and economic academia in most of the EU member states. This debate covered areas which had previously been neglected or even completely excluded from discussion in the respective member states. One example is legal capital, which has been taken for granted in Germany and is being debated extensively—though too defensively—in the light of Anglo-American solutions.

The Company Law Action Plan had opened a new era of comparative company law discussion in Europe. Some of this has already been mentioned in the context of European group law harmonization. In Germany and other member states, the discussion on what European company law should contain or leave to the individual states has been ongoing but has seen rather limited legislative success. The most recent Company Law Directive of 14 June 2017[68] is merely a codification of six former company law directives dating from 1982 until 2012; done in the hope of creating more transparency for the general public, it is however not more than a rather rudimentary kind of company law statute. By contrast, substantive reforms are contained in the Shareholder Rights Directive,[69] which was adopted

66 High Level Group of Company Law Experts, *A Modern Regulatory Framework for Company Law in Europe, Report for the European Commission*, Brussels, 4 November 2002; reprinted in Guido Ferrarini, Klaus J. Hopt, Jaap Winter, and Eddy Wymeersch (eds), *Reforming Company and Takeover Law in Europe* (2004), annex 1.

67 High Level Group of Company Law Experts, *Report on Issues Related to Takeover Bids*, Brussels, 10 January 2002; reprinted in Ferrarini *et al* (n 67), annex 2.

68 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), Official Journal of the European Union of 30 June 2017 OJEU L 169/46.

69 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, Official Journal of the European Union of 20 May 2017 OJEU L 132/1.

on 17 May 2017 after a long and controversial discussion[70] and with many, partly uneasy, compromises being made between the European Commission, the European Parliament, the European Council and the member states. The Directive covers 1) the identification of shareholders, transmission of information, and facilitation of the exercise of shareholder rights, 2) the transparency of institutional shareholders, asset managers, and proxy advisors, 3) remuneration policy as regards directors, remuneration reports, and shareholder say-on-pay, and 4) transparency and approval of related party transactions.

Under the aspect of comparative company law, three remarks are worth making. First, the Directive reflects new dimensions of company law as discussed internationally, ie more emphasis is now on the shareholders, including institutional shareholders, as compared to the board. Whether the hopes placed on better corporate governance by shareholders are justified remains to be seen. Second, the fundamental division between German-style group law (Konzernrecht) and the regulation of controlling shareholders and minority protection as evidenced by the rules on related party transactions has not been levelled out. The compromise was giving options to the member states. Third, new players who traditionally had not been covered by company law have come forward: institutional shareholders and hedge funds, asset managers, proxy advisors and others. As to each of these players there has been lively academic and public discussion that has not yet led to a consensus, not even on core regulation apart from certain transparency requirements. These new developments produce more fundamental questions concerning company law and, as a logical consequence, questions concerning comparative company law. Some of this will be dealt with in the following section.

III. Company Law, Comparative Law, and Beyond

1. Company Law, Capital Market and Banking Law, and Comparative Law

(a) The Origins of Investor Protection in US Company Law and Securities Regulation

Investor protection against securities fraud has a long history that goes beyond traditional company law. The first legislation on investor protection dates back to the times of state trading companies doing business overseas in the seventeenth and eighteenth centuries, first in the Netherlands after the creation of the Dutch East India Company in 1602, then in France, England, and Germany.[71] Stock exchange regulation that aimed at efficient and orderly transactions on the stock exchanges and was directed against speculation and manipulation also has a long history in all of these countries. Yet securities regulation appeared as a specific area of legislation, practice, and academic research for the first time in the United States after the Great Crash. The two cornerstone acts were the Securities Act of 1933, which dealt with the introduction of new securities on the market and required full disclosure, and the Securities Exchange Act of 1934, which covered the trading of securities

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70 Cf. among many others Klaus J. Hopt, 'Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance', *New York University Journal of Law & Business* 12 (2015) 139-213.

71 Richard Ehrenberg, *Die Fondsspekulation und die Gesetzgebung* (Berlin, 1883); Frentrop (n 9), 115 ff.

within the stock exchanges and externally over-the-counter.[72] These two acts were supplemented a short time later by the Trust Indenture Act of 1939 concerning the placement of bonds, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Securities regulation was entrusted primarily to the Securities and Exchange Commission, a federal agency with rulemaking power. Over the years it developed into a state body that did not confine itself to dealing with securities trading and market activities; instead, for the sake of investor protection, it also looked into the internal affairs of corporations. Besides the Securities and Exchange Commission, the courts and the individual shareholders and investors acting as 'private attorneys general' have an important role in securities law enforcement.

The American system is characterized *inter alia* by the co-existence and interlinking of company law, which remained within the domain of the states, and federal securities regulation. Some have suggested that the division between these two areas of law can be rationalized on the following basis. While companies are created in a specific state depending on the attractiveness of its company law, and remain subject to the law of that state under the American conflict of laws rule, securities markets require regulation which stretches beyond state boundaries. Yet this is only a partial explanation. Another is that federal law reacted and in a sort of vertical competition is still ready to react more quickly to the acute and publicly felt needs of investor protection. It is probable that the boundary between United States company law and securities regulation would have developed differently had there been no federal–state division. The fact remains that company law and securities regulation not only complement each other so that they are, at least in part, functionally interchangeable,[73] but even in legal terms there is much common ground, similarity of concepts, and points of contact between them. This must also be taken into consideration when looking at comparative company law.

(b) The Global Advance of US Securities Regulation and its Impact on Company and Capital Market Law around the World

From the 1930s onwards, United States securities regulation served as a model for securities regulation all over the world, first in Europe, then in Japan after World War II, and later in a diverse range of other countries. The first European country to follow the American example was Belgium, where capital market regulation was introduced by royal decree in 1935. The Belgian equivalent to the Securities and Exchange Commission was the *Commission bancaire*, which had broad powers. Like its American counterpart, over the years it did not refrain from developing specific company law rules if it felt shareholders and investors needed them. This is particularly true of rules covering groups of companies, which at that time did not yet exist in Belgian company law. In contrast to the United States, the courts did

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72 See Joel Seligman, *The Transformation of Wall Street* (3rd edn, New York 2003), 1.

73 Cf. Klaus J. Hopt and Eddy Wymeersch (eds), *Capital Markets and Company Law* (Oxford, 2003); Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus J. Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, Edward Rock, *The Anatomy of Corporate Law, A Comparative and Functional Approach* (3d ed., Oxford 2017), ch. 9: Corporate Law and Securities Markets, p. 243 et seq.. For a thorough empirical investigation see Robert B. Thompson and Hillary A. Sale, 'Securities Fraud as Corporate Governance: Reflections upon Federalism', (2003) 56 *Vanderbilt LR* 859.

not play a similarly important role and the concept of 'private attorney general' did not take hold on this side of the Atlantic. France followed much later. The fundamental Commercial Companies Code of 1966 provided special rules for companies that raise capital on the capital markets under the concept of *appel public à l'épargne*. In 1967 the French Securities and Exchange Commission, the *Commission des Opérations de Bourse* (COB), was created and became increasingly active over the years.

Two countries which were long reluctant to follow the American example and which were forced to do so only at a much later stage are Japan and Germany. In the aftermath of World War II Japan came under direct pressure from the United States to introduce American-type securities regulation, and it did so by means of the Securities and Exchange Law of 1948. This went hand in hand with anti-monopoly regulation, again the result of United States pressure for de-concentration of economic power and for more democratization. Germany was also very reluctant to follow the trend of American securities regulation, although it had already adopted cartel legislation in 1957. This hesitancy was mainly due to the fact that German stock exchanges and securities markets were underdeveloped in the German bank-based system. This system, also called Rhenanian capitalism, was characterized by insider networks of industrial and trading companies, banks, and insurance companies. It had developed interlocking directorates and participations, with the banks and insurance companies serving as system intermediaries. It was not until 1995 that a modern capital market law together with a federal capital market supervisory agency was formed. It was created then because of market pressure and the quickly growing requirements of European company and capital market law, which itself is modelled on the laws of Britain, France, and some other member states. The Hague Academy chose capital markets and conflict of laws as the topic for one of its courses (2000).[74]

The latecomers in securities regulation were the Central and Eastern European states in the 1990s. Practically all of them introduced capital market laws along the lines of Western examples such as the American, French, and German ones. They were motivated by the hope of quickly developing their capital markets and of joining the European Union in a relatively short time, so they adopted, in particular, European Community standards. The rise of the still-rudimentary Chinese capital market law had its real start in 1992 with the creation of the Chinese central securities supervisory organs and in 1998 with the Chinese Securities Act.[75]

The spread of investor protection and securities regulation from the United States around the world could not but have consequences for comparative law. It is obvious that in practically all countries which introduced capital market laws, legislation was prepared after its draftsmen had had a close look at the American model and experiences. Comparative research in these countries before or after such legislation reported in detail about American securities legislation, often together with American company law. Most of the time these studies were just reports on the American system or bilateral comparisons, but gradually multilateral comparative law studies also emerged. Two influential examples are studies published in 1970 on the corporate securities markets in Europe and the United States and the

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74 Herbert Kronke, 'Capital Markets and the Conflict of Laws', (2000) 286 *Académie de Droit International: Recueil des cours* 245.

75 Knut B. Pissler, *Chinesisches Kapitalmarktrecht* (Hamburg, 2004).

legal status of securities there.[76] Another monograph from 1975[77] dealt with comparative investor protection, a concept which at that time did not exist in German company law, since the latter focused exclusively on existing shareholders. It laid the foundations for integrating investor protection in company, capital market, and banking law, the latter being indispensable in the traditional German bank-based system.

A later wave of comparative company and capital market laws came with the rise of the European Community's harmonization of these fields. Most of the time these studies were not bilateral works comparing the law of one member state with the emerging European law in the field, but multilateral comparisons of the laws of the main member states, often starting with the American model or including it in their comparison. Only when European law had reached a more mature stage with a bulk of directives and more sophisticated concepts did comparative studies start to deal only with European comparisons. But even today in relatively new areas of European company law and securities regulation such as corporate finance, tracking stocks, mergers and acquisitions, management buy-outs, insider dealing, take-over law, manipulation, and alternative trading systems, the comparative focus is still on American law.

There is no room to go into the common ground and concepts of American and European company law and securities regulation, as interesting as that would be. Sometimes these concepts are so embedded in national law that their foreign origins are nearly forgotten. It must suffice to mention disclosure[78] as one of the best examples. Today, disclosure is a key principle in company and capital market law all over the world. It has its actual roots in Gladstone's Joint Stock Companies Act of 1844 and has become the leading principle of American securities regulation. Brandeis' famous slogan of 1913 concerning the misuse of 'other people's money' has become the credo: 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.'[79] Disclosure and auditing are considered by academics as well as legislators to be the cornerstones of corporate governance. Surprisingly enough, the American corporate governance discussion in academia (not in practice) tends to neglect disclosure and auditing as major means of corporate governance. It would be interesting to speculate about the reasons for this: efficient capital market hypothesis; distrust of regulation and regulatory agencies (including the Securities and Exchange Commission); public choice arguments; or federal state issues, including the modern conviction that competition of company laws leads to a race to the top instead of Cary's race to the bottom, a thesis that is very controversial indeed and whose veracity may differ in the United States and Europe.[80]

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76 *Le régime juridique des titres de sociétés en Europe et aux Etats-Unis: Les émissions de titres de sociétés en Europe et aux Etats-Unis* (Brussels, 1970).

77 Hopt (n 36); *idem*, 'Vom Aktien- und Börsenrecht zum Kapitalmarktrecht?' (1976) 140 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 201 and (1977) 141 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 389.

78 See the comprehensive study by Hanno Merkt, *Unternehmenspublizität* (Tübingen, 2001) and more generally Niamh Moloney, *EU Securities and Financial Markets Regulation* (3d ed., Oxford, 2014). For theoretical and empirical economics on disclosure see *Christian Leuz and Peter D. Wysocki,* 'The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research', Journal of Accounting Research 2016, 54(2), 525.

79 Louis D. Brandeis, *Other People's Money and how the Bankers Use it* (New York, 1914), 92.

80 See below, Section III.2.

(c) The Emergence of a Separate Bank Company Law after the Financial Crisis

The dominant view on the goal of the corporation is long-term profit for the shareholders. The classic formulation is by the American Law Institute's Principles of Corporate Governance § 2.01 (a): "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain". This goal is only slightly tempered in sub-section (b), which permits taking "into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" and devoting a reasonable amount to public welfare. In many European countries the law is somewhat more pluralistic. In Germany, for example, the management board must weigh in its own discretion the interests of the shareholders, labour and the public good. The United Kingdom has made a careful step in the same direction.[81] But even under German law it is clear that the interests of the company and thereby of the shareholders prevails in practice (leaving aside the German path-dependent labour codetermination in the supervisory board). Only in times of financial rescue and insolvency proceedings is it recognized that risk together with governance ("ownership") has been transferred from the owners to the creditors.

As to bank governance the counterpoint is set by the Basel Committee on Banking Supervision, the world's leading authority on banking regulation and banking supervision. Its Corporate Governance Principles for Banks from July 2015 state at the very beginning: "The primary objective of corporate governance should be safeguarding stakeholders' interest in conformity with public interest on a sustainable basis. Among stakeholders, particularly with respect to retail banks, shareholders' interest would be secondary to depositors' interest."[82] Simultaneously, this reduces the relative importance of controlling shareholders, institutional investors and shareholder control in general, as is presently the centre of attention in the corporate governance of corporations.[83] This position, one shared by national and international banking agencies, is a clear rejection of the dominant viewpoint in Anglo-Saxon and most international corporate governance literature. The consequence is the emergence of a bank governance that is very special as compared to the general corporate governance of non-financial companies.[84] Accordingly, the EU Capital Requirements Directive (CRD IV) has mandated extensive regulation of the duties of bank managers, bank boards, and company-internal key function holders. Similar requirements exist for the insurance business and other financial market players.

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81 According to Section 172 of the Companies Act: "(A) director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard [to the long-term consequences and the interests of other stakeholders]."

82 Basel Committee on Banking Supervision, Guidelines, Corporate governance principles for banks, Bank for International Settlements (BIZ), Basel, July 2015, p. 3.

83 An example is the Shareholder Rights Directive, supra, n. 70.

84 Cf. Klaus J. Hopt, 'Corporate Governance of Banks and Other Financial Institutions After the Financial Crisis', *Journal of Corporate Law Studies* 13 Part 2 (2013) 219; also in Geoffrey P. Miller (ed.), *Economics of Financial Law*, vol. II (Cheltenham, 2016), Part III Governance p. 573; *idem*, 'Corporate Governance von Finanzinstituten – Empirische Befunde, Theorie und Fragen in den Rechts- und Wirtschaftswissenschaften', *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2017, 438; John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne, *Principles of Financial Regulation* (Oxford, 2016), ch. 17: Bank Governance.

As a consequence, a specific law for banking and financial markets companies, eg as to their board of directors, has been emerging. This has two far-reaching consequences. First, for banks and other financial institutions the traditional company law issues are on the verge of being fundamentally reconsidered, stiffened, and supervised by the competent regulatory agencies (ie the European Central Bank, other bank regulators, and capital market commissions). Relevant areas are, for example, transparency, the composition of the board, the role of independent directors, and the duties and liability of directors as to risk management, organization, and compensation.[85] Second, and even more far-reaching, the repercussion of this into the theory and practice of non-financial companies is at stake. While corporate practitioners as well as academics maintain that this collection of measures can be justified only from a bank-regulatory view and that it cannot be adopted in corporate law,[86] there is obviously the danger that the courts will take these regulations and their application in the banking field into consideration and possibly follow them when deciding company law cases regarding non-financial companies; this would be a landmark shift in company law from a market economy-based law with a fair amount of fall-back provisions towards mandatory provisions as applied by regulators.

2. Company Law and Company Self-Regulation: The International Code Movement

(a) Cadbury and its Followers Abroad

Comparative company law does not stretch out only to neighbouring areas of law as has just been explained in respect of capital market law, and as could also be analysed for other fields such as auditing or banking and financial law. It goes even beyond law itself into less formal rules. This is the international code movement, a phenomenon that has long been present in environmental law, banking law, cartel law, international investment law, and the law of transnational enterprises. But its use to regulate companies themselves, their organs, and their relationship with auditors, is new. Traditionally this field was reserved for company law, and, more often than not, for mandatory company law at that.

The beginning can be pinpointed precisely to 1992, when the Report of the Committee on the Financial Aspects of Corporate Governance was published in London. This has become known internationally as the Cadbury Report, after the name of the chairman of the committee. It was the first in a whole series (Greenbury, Hampel, Higgs, and Tyson), it was consolidated in the Combined Code which was issued as an appendix to the Listing Rules, and it is now the UK Corporate Governance Code 2016 of the Financial Reporting Council (FRC) .

This code movement was successful not only in the United Kingdom but also in many other countries, although the reasons for the adoption of a code vary. Sometimes it is adopted merely in order to avoid impending mandatory company law; in other instances the

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85 Cf. for a procedural approach Martin Petrin, 'Regulatory Analysis in Corporate Law', *Modern Law Review* 79 (2016) 537; Iris H.-Y. Chiu and Anna Donovan, 'A new milestone in corporate regulation: procedural legalization, standards of transnational behavior and lessons from financial regulation and anti-bribery regulation', *Journal of Corporate Law Studies* 17 (2017) 427.

86 E.g. Guido Ferrarini, Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda, ECGI Law Working Paper No 347/2017, March 2017, p. 19 et seq..

explanation is simply imitation or perhaps even legal fashion. A Report for the European Commission of January 2002 found that corporate governance codes existed in thirteen out of fifteen member states of the then European Union, often more than one per member state. In total, the report found forty such codes. In the meantime the European Corporate Governance Institute (ECGI) in Brussels has collected many more such codes and lists them on its homepage; moreover, comparing corporate governance codes internationally has become a research area of its own.[87] While these codes have many subjects and rules in common, there are also some considerable differences, in particular as far as labour co-determination is concerned, and also as to whether only the interests of the shareholders are to be considered as part of company regulation, or whether social and stakeholder issues must also be taken into account. Differences also exist in respect of shareholders' rights, the one-tier and the two-tier board system, the independence of board members and of the auditors, board committees, and the content and degree of disclosure. As an enforcement mechanism, most codes use mere moral suasion or the disclose-or-comply mechanism, the idea being that if the non-compliance is made known to the institutional investors and the financial markets, it will be punished by reductions in the share price (though whether this is true in practice is an open empirical question). In other countries the code also does not have the force of law, but compliance is obligatory for companies that want to be listed.

(b) The Pros and Cons of Company Self-Regulation from a Comparative Perspective

From a functional point of view, which is the perspective of comparative company lawyers, these voluntary or paralegal rules can certainly not be ignored. In substance they deal with core company law and, depending on the institutional environment, they may be as effective as legal rules, sometimes even more effective since voluntary compliance is better than forced obedience. Yet the experience in other countries and fields reveals the problems with this approach. In Germany, for example, the former voluntary German Insider Trading Guidelines failed miserably. The experience with the voluntary German Takeover Code has been better, but not good enough to make a formal takeover act redundant. Even British-style self-regulation has had its drawbacks, as the Financial Services and Markets Act of 2000 demonstrates. Furthermore, economic and behavioural theory shows that voluntary rules have considerable trade-offs. Legal experience in some countries shows that they present thorny problems of compliance, liability, relationship to legal rules, free-riding, and anti-trust issues, amongst others. In the European Union context, an important legal side of this discussion may also be subsidiarity, under both the EU Treaty and national constitutional law. In any case, the conventional distinction between those countries with a tradition of self-regulation and those without gets blurred. On a theoretical legal and economic level, the discussion of the pros and cons of self-regulation continues.[88] Finding the right mixture between self-

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87 Cf. Jean J. du Plessis, Chee Keong Low (eds.), *Corporate Governance Codes for the 21st Century* (Cham, 2017).

88 E.g. J. Holland, 'Self Regulation and the Financial Aspects of Corporate Governance', (1996) *Journal of Banking Law* 127; Cheffins (n 32) 364 ff; Klaus J. Hopt (n 5) 65 et seq. with international experiences; *idem*, 'Self-Regulation in Banking and Finance: Practice and Theory in Germany', in *La Déontologie bancaire et financière* (Brussels, 1998), 53; for Germany *idem*, 'Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen', in: *Festschrift für Hoffmann-Becking* (Munich, 2013) 563. For a critical view see e.g. David Kershaw, 'Corporate law and self-regulation', LSE Legal Studies Working Paper No, 5/2015 available at < http://ssrn.com/abstract=2574201 >; Beate Sjafell, 'When the

regulation and the 'big stick' seems as promising as it is difficult. A legal theory of self-regulation still needs to be developed and cannot succeed without learning from other countries' experiences and from other disciplines like economics and the behavioural sciences.[89]

3. Comparative Company Law and Economics

Economic considerations have been part of company law practice and research since the early days of modern company law. This has been particularly striking in the preparation of many codifications as early as the second half of the nineteenth century. For example, David Hansemann's 1838 publication, *The Railways and their Shareholders in their Relationship to the State*, is still worth reading. It was of very considerable influence in its time. Hansemann was the father of the Prussian Company Act of 1843, the first general company act in Germany. If one looks to Austria and the works of Franz Klein, who was at the head of the Austrian company law movement at the turn of the nineteenth century, one finds an amazing knowledge of comparative company law as well as a very modern insight into economic facts, contexts, and interrelationships.[90]

In the last century, in particular during its second half, economics developed into a highly sophisticated and formalized science and had other priorities than dealing with legal rules and their application, which seemed too 'soft' to be grasped by economic methods. The division of the traditional university faculties—which, at least in Germany, had originally combined lawyers and economists to their mutual benefit—may also have contributed to this alienation between the disciplines. Yet things have changed considerably during the last few decades, in particularly since the 1980s with the rise of the law and economics movement that started in the United States and from there spread all over Europe. It would, of course, be futile to try to sum up even only the most important contributions of economics to company law and to the understanding of the company. It would be even less possible to look at the more fundamental economic contributions, for example, of Gary Becker, Ronald Coase, Merton Miller, Douglass North, Oliver Williamson, and others, or, from the German and Austrian side, of Friedrich A. von Hayek, Walter Eucken, and Franz Böhm. For the purposes of the present survey, it suffices to mention landmark books such as Richard A. Posner and Kenneth E. Scott's *Economics of Corporation Law and Securities Regulation* (1980); Frank H. Easterbrook and Daniel R. Fishel's *The Economic Structure of Corporate Law* (1991); or Roberta Romano's *The Genius of American Corporate Law* (1993), as well as her reader, *Foundations of Corporate Law* (1993); all of which were preceded and followed by important articles by the same authors and many others. Economic fields of research that are of key interest to company and capital market law are, among others, new institutional economics, finance theory, law and economics, organization theory and theory of the

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Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes', in du Plessis and Low (n 87) 23 attacking shareholder primacy.

89 More generally see the ground-breaking work of Christopher Hodges, *Law and corporate behavior, integrating theories of regulation, enforcement, compliance and ethics* (Oxford, 2015).

90 Peter Doralt and Susanne Kalss (eds), *Franz Klein: Vorreiter des modernen Aktien- und GmbH-Rechts* (Vienna, 2004).

enterprise, economics of information, and behavioural economics.[91] Sometimes an approach is adopted which combines elements of economics, the political sciences, and sociology.[92] The corporate governance movement has led to renewed interest in empirical data, for example about the different patterns of shareholdership in the United States and Europe.[93]

In this tide, the different company and capital market laws and institutions in various countries became the subject of economic research. Here the economic studies of Rafael La Porta and others,[94] as controversial as they may be, stand out. But also noteworthy is the work, especially of American scholars, on the cross-country comparison of the evolution of company law[95] or on Japanese law, for example on Japanese groups of companies (*keiretsu*).[96] Most recently, the joint efforts that produced *The Anatomy of Corporate Law: A Comparative and Functional Approach*[97] may be mentioned. The book compares the company laws of six major jurisdictions—the United States, France, Germany, Great Britain, Japan, and in its 3rd edition also Brazil—and undertakes to provide an analytical framework for corporate law that transcends particular jurisdictions. The book takes a strongly functional approach and is more interested in finding out why there is so much uniformity of company law than in analysing or even merely describing the many divergences.[98] In this vein there is acute interest in finding the right incentives for directors and for corporation's key function holders. The lack of such incentives and even perverse incentives have woefully come forward in the financial crisis. The discussion surrounding too busy directors

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91 For further information see eg *Journal of Law and Economics, Journal of Legal Studies, Journal of Law, Economics & Organization, Journal of Institutional and Theoretical Economics, International Review of Law and Economics;* the *New Palgrave Dictionary on Economic Terms* and the *Encyclopedia of Law and Economics;* see also from a legal-economic perspective the handbook of Stephen M. Bainbridge, *Corporation Law and Economics* (New York, 2002); Holger Fleischer, 'Behavioral Law and Economics im Gesellschafts- und Kapitalmarktrecht—ein Werkstattbericht', in Andreas Fuchs, Hans-Peter Schwintowski, and Daniel Zimmer (eds), *Wirtschafts- und Privatrecht im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung: Festschrift für Ulrich Immenga* (Munich, 2004), 575.

92 Mark J. Roe, *Political Determinants of Corporate Governance* (Oxford, 2003) and previously *idem, Strong Managers Weak Owners: The Political Roots of American Corporate Finance* (Princeton, 1994); see also *idem* (ed.), *Corporate governance, political and legal perspectives* (Cheltenham, 2005).

93 Fabrizio Barca and Marco Becht (eds), *The Control of Corporate Europe* (Oxford, 2001).

94 See nn 14 and 17; cf, Rafael LaPorta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches, and Andrei Shleifer, 'Judicial Checks and Balances', (2004) 112 *Journal of Political Economy* 445.

95 Katharina Pistor, Yoram Keinen, Jan Kleinheisterkamp, and Mark D. West, 'The Evolution of Corporate Law: A Cross-Country Comparison', (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791.

96 Among others Ronald J. Gilson and Mark J. Roe, 'Understanding the Japanese Keiretsu: Overlaps between Corporate Governance and Industrial Organization', (1993) 102 *Yale LJ* 871. See also, more recently, several contributions in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds), *Corporate Governance in Context—Corporations, States, and Markets in Europe, Japan and the US* (Oxford, 2005).

97 Above (n 73).

98 For major articles on the book, see David A. Skeel, Jr, 'Corporate Anatomy Lessons', (2004) 113 *Yale LJ* 1519; Christine Windbichler, 'Murmeln für Konzerne—Gesellschaftsrecht als Glasperlenspiel', in *Festschrift für Volker Röhricht* (Cologne, 2005), 693; Herbert Wiedemann, 'Auf der Suche nach den Strukturen der Aktiengesellschaft: The Anatomy of Corporate Law', (2006) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 240.

("overboarding") and the regulation of director remuneration is in part a result of this incentive problem .[99]

IV. Perspectives for Future Research

1. Core Comparative Company Law

What will be or should be the agenda for comparative company law and research? The answer is bound to be subjective. Having said that, of course, most of the classical topics of company law will be on the agenda, in particular those contained in the Company Law Action Plan. But work will not be confined to these areas. What follows is an outline of some of the areas which are likely to see further efforts.

The first relates to shareholders. A modern tendency, which has been mentioned before in the context of the EU Shareholder Directive,[100] is to revitalize private shareholders by giving them more legal rights—either as such in the general meeting, or as minorities, or even individually—and facilitating the use of those rights.[101] Rapid development of modern technology helps. The quick, broad disclosure that is now possible is a precondition for granting shareholders more rights. There is even the hope of using private investors as 'attorneys general'. Yet the rational disinterest of private shareholders in monitoring remains unless they are blockholders or even controlling shareholders, and in the latter two instances all the issues of principal-agent conflicts among shareholders and the regulation of groups of companies arise. On the other hand, institutional investors are becoming more and more numerous and influential, not only in the United States and Great Britain, but also in Continental Europe. Institutional investors monitor by entry and exit (the venerable Wall Street rule), but also to a certain degree within the company.[102] Yet it remains open to question whether institutional investors, in particular hedge funds, will really undertake considerably more internal monitoring and policy shaping.

In respect of creditor protection, there is the perennial question of whether creditors—at least contractual creditors—should look out for themselves instead of relying on the protection of mandatory rules of company law. Furthermore, the need for and the role of traditional legal capital, a characteristic element of Continental European company law and part of the second Directive, has come under strain after the Report of the High Level Group and the Company Law Action Plan. Anglo-American wisdom and modern economic theory call these capital

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99 See in this context Florian Möslein and Karsten Engsig Sørensen, Nudging for Corporate Long-termism and Sustainability? Regulatory Instruments from a Comparative and Functional Perspective, available at < https://ssrn.com/abstract=2987734 >. Generally Cass R. Sunstein, 'The Ethics of Nudging', *Yale Journal of Regulation* 32 (2015) 413.

100 Above (n 69).

101 Theodor Baums and Eddy Wymeersch (eds), *Shareholder Voting Rights and Practices in Europe and the United States* (London *et al*, 1999); Sabrina Bruno and Eugenio Ruggiero (2011, above n 45); Massimo Belcredi and Guido Ferrarini (eds.), *Boards and Shareholders in European Listed Companies* (Cambridge, 2013).

102 See Theodor Baums, Richard M. Buxbaum, and Klaus J. Hopt (eds), *Institutional Investors and Corporate Governance* (Berlin, New York, 1994); more recently Ronald J. Gilson and Jeffrey N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', 113 Columbia Law Review 863 (2013). .

rules into question.[103] They suggest that legal capital rules provide little benefit for company creditors, while burdening shareholders, some of the creditors, and society as a whole. The controlling shareholders and/or managers of major public companies (and in groups, the parent) gain from such rules limiting dividends. Instead of minimum capital requirements, stated capital and appropriate disclosure combined with stricter insolvency rules are proposed as being more apt in a market economy.

As to the role of other stakeholders, the pros and cons of labour co-determination,[104] its different forms (as work councils or on the board), and, in particular, its path dependencies need legal and economic research. The attempts to approve or disapprove of co-determination by theoretical legal or even constitutional arguments are not convincing. The evaluation depends instead on microeconomic empirical data and experience, and on whether macroeconomic impacts are also considered or left aside.

More generally, comparative company law research will certainly continue to boom in the context of corporate governance. This field is today one of the most active melting pots of economic, legal, and social sciences research, both on a theoretical and empirical level, and with contributions from the United States, and Europe and, in the meantime, all over the world. Since the late 1990s, when the field of comparative corporate governance emerged, it has virtually exploded.[105] For core comparative company law, the role, structure, and functioning of the board is particularly interesting.[106]

The logic of harmonizing the core areas contained in the Company Law Action Plan and those closely connected with it in the field of financial market regulation leads towards more and more concretization and harmonization. Of course, this is a dangerous path which may lead to overregulation instead of deregulation, and to regulation neglecting the historical, cultural, and also economic specificities of different markets, countries, and legal cultures. Here, comparative company law and complementary market institution research needs both more empirical investigation and the input of economic and social sciences and their regulation theories.

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103 See eg Friedrich Kübler, 'The Rules on Capital under the Pressure of the Securities Markets', and Eilís Ferran, 'Legal Capital Rules under the Pressure of the Securities Markets—the Case for Reform, as Illustrated by the UK Equity markets', in Hopt and Wymeersch (n 73), 95 ff and 115 ff respectively.

104 cf Katharina Pistor, 'Codetermination: A Sociopolitical Model with Governance Externalities', in Margret Blair and Mark J. Roe (eds), *Employees and Corporate Governance* (Washington, 1999), 163; Gary Gorton and Frank A. Schmid, 'Capital, Labor, and the Firm: A Study of German Codetermination', (2004) 2 *Journal of the European Economic Association* 863; Klaus J. Hopt, 'Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe', (1994) 14 *International Review of Law and Economics* 203. A comprehensive survey of recent research on codetermination in Germany is provided by Uwe Jirjahn, 'Ökonomische Wirkungen der Mitbestimmung in Deutschland: ein Update', in *Schmollers Jahrbuch* 131 (Berlin, 2011) 3.

105 cf the bibliography in Hopt *et al* (n 3), 1201 ff, and in Fleckner and Hopt (n 3).

106 cf eg Klaus J. Hopt and Patrick C. Leyens, 'Board Models in Europe, Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', [2004] *European Company and Financial LR* 135; Gérard Hertig, 'On-going Board Reforms: One Size Fits All and Regulatory Capture', (2005) 21 *Oxford Review of Economic Policy* 269; Karsten Engsig Sørensen, Hanne Søndergaard Birkmose, Mette Neville (eds.), *Board of directors in European companies* (Alphen aan den Rijn, 2013); Klaus J. Hopt and Paul Davies, 'Corporate Boards in Europe – Accountability and Convergence', *The American Journal of Comparative Law (AJCL)* 61 (2013) 301. See also the comprehensive comparative study for the European Commission: Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster, *Study on Directors' Duties and Liability* (London, April 2013).

2. Comparative Company Law and Beyond

Other major problem areas concerning comparative company law are of a more general nature.[107] Let me just mention three. First, there is a challenging discussion going on as to whether, in the end, convergence or divergence of company law will prevail.[108] This discussion is occurring internationally in the United States as well as in Europe. Some American authors have even predicted the end of the history of company law.[109] Yet from a European viewpoint, the more probable prognosis is neither a plain 'yes' nor 'no'. Of course, a considerable amount of convergence towards the shareholder-oriented model of the corporation can be observed in the real world. The forces of market competition, shareholder activism, in particular of institutional shareholders, and international governance practices are strong, and in my opinion indeed much stronger than those of harmonization. Yet important path dependencies[110] will remain, quite apart from the thorny problems of merely apparent convergence and legal transplants.[111] Institutions, ownership structures, company and capital market systems, language, and cultural background will not become the same. On the other hand, I do not share the opinion that corporate governance systems cannot learn and considerably adapt themselves to other sorts of systems without losing their stability and equilibrium.[112]

A second, highly controversial debate concerns more specifically harmonization versus competition of company law legislators. The debate started in the United States, where the traditional justification for mandatory company law provisions was based on the fear of the race to the bottom that was thought to be inevitable without them. Today, however, the prevalence of the market and the beneficial effects of competition as a search mechanism are emphasized. According to this view, undistorted competition of legislators and rule-makers does not lead to the bottom, but rather to the top. Roberta Romano, one of the leading advocates of this theory, talks of the genius of American law in this context and pleads

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107 See eg the road-map for further research in Kraakman *et al* (2d ed., n 2), 222 ff.

108 Cf particularly Joseph A. McCahery, Piet Moerland, Theo Raaijmakers, and Luc Renneboog (eds), *Corporate Governance Regimes, Convergence and Diversity* (Oxford, 2002); Jeffrey N. Gordon and Mark J. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge, 2004); Mathias M. Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre* (Tübingen, 2005); Jeffrey Gordon, 'Convergence and Persistence in Corporate Law and Governance', ECGI Law Working Paper No 370/2017'.

109 Henry Hansmann and Reinier R. Kraakman, 'The End of History for Corporate Law', (2001) 88 *Georgetown LJ* 439,; *contra* John C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications', (1999) 93 *Northwestern University LR* 641; Ronald Gilson, 'Globalization of Corporate Governance: Convergence of Form or Function', (2001) 49 *AJCL* 329.

110 Lucian Bebchuk and Mark Roe, 'A Theory of Path Dependence in Corporate Governance and Ownership', (1999) 52 *Stanford LR* 127.

111 The literature is abundant; see recently Daniel Berkowitz, Katharina Pistor, and Jean-François Richard, 'The Transplant Effect', (2003) 1 *AJCL* 163; Holger Fleischer, 'Legal Transplants im Europäischen Gesellschaftsrecht—eine Fallstudie am Beispiel fiduziarischer Geschäftsleiterpflichten', in *Gedächtnisschrift für Meinhard Heinze* (Munich, 2005), 177; Hideki Kanda and Curtis J. Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law', (2003) 51 *AJCL* 887; and the comprehensive study by Jan von Hein (n 36). Most recently Katja Langenbucher, *Economic Transplants* (Cambridge, 2017).

112 But see Reinhard H. Schmidt, economist at the University of Frankfurt am Main, in various contributions, though more recently in an attenuated form. Cf Jan Pieter Krahnen and Reinhardt H. Schmidt (eds), *The German Financial System* (Oxford, 2004).

passionately against all sorts of harmonization, even, *horribile dictu*, against the United States federal securities legislation.[113] Again, from a European perspective the answer is mixed. While the former attempts of the European Commission towards full harmonization of company law must be considered to have failed, and for good reason, this does not at all mean that Europe can do without harmonization—in our case, harmonization of company law. The creation of the European internal market requires at least some core harmonization of the market laws, certainly of core banking, capital market, and financial law, but also of some core company law. The above-mentioned Company Law Action Plan and, more recently, the EU Shareholder Rights Directive,[114] the details of which are certainly debatable, seem to take a reasonable middle way.

A third problem area for comparative company law research should be added, though its relevance is more general. It is enforcement, that is, litigation, courts, and regulatory agencies. Continental European lawmakers and academics tend to underestimate the role of courts and litigation. This is in striking contrast to the United States. Treble damages suits, class actions, quorum litis, discovery, and many other instruments of American law are unknown or not well regarded in many European countries, certainly in Germany. As to the role of the individual shareholder as a 'private attorney general', perceptions are changing, though rather slowly. Furthermore, company law is a common domain of company practice and interpretation, and sometimes interference, by more or less specialized courts;[115] in some countries, such as Germany, this includes considerable influence by academics. Yet, to a certain degree, company law is also administered and created by regulators such as the American Securities and Exchange Commission, the Belgian *Commission bancaire, financière et des assurances*, the (former) *Commission des Opérations de Bourse* in Paris, and the *Commissione Nazionale per le Società e la Borsa* in Rome. In Germany, for example, establishing a system of internal control and early warning within the company was made a legal requirement by the Company Law Reform Act of 1998. Yet a similar requirement has long existed for banks and is enforced by bank supervision. It would appear that some of the experiences and requirements made in bank supervision will spill over to company law. In a European and even global context, it follows that there is a definite need for exchange and cooperation between regulators.[116] This is well known for anti-trust, banking law, and securities regulation, and definite progress has been made after the financial crisis and within the European Union. But it will soon be felt also in company law. Again, the field is not just one for comparative company, financial markets, and procedural law, but for economic and

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113 Roberta Romano, *The Genius of American Corporate Law* (Washington, 1993). For Europe, see in a more nuanced way eg H. Merkt, 'Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber" ' (1995) 59 *RabelsZ* 545; the concept of competition between legislators is rejected by Eva-Maria Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt* (Tübingen, 2002).

114 Supra Section II.3.(c).

115 Holger Fleischer, Sebastian Bong and Sofie Cools, 'Spezialisierte Spruchkörper im Gesellschaftsrecht, Summary: Specialized Courts in Company Law', *Rabels Zeitschrift* 81 (2017) 608 and issue 3 (July 2017) 497-660.

116 Cf for example Annette Althaus, 'Principles of Cross-Border Supervision: The Swiss Approach to Enhanced Co-operation in International Financial Services Supervision', (1999) 1 *International and Comparative Corporate LJ* 125; Kathrin Berkenbusch, *Grenzüberschreitender Informationsaustausch im Banken-, Versicherungs- und Wertpapieraufsichtsrecht* (Baden-Baden, 2004); Armour et al. (n 84) ch. 28: International Regulatory Coordination.

social science theory on organizations, government, regulatory agencies, interest groups, and more generally public choice. One might even ask whether regulators should not themselves be bound by good corporate governance principles when they regulate corporations and banks.[117]

At the end of this chapter on comparative company law, there is a general prognosis of, and a plea for, more internationalization and interdisciplinary research. In many countries, company law is still studied and taught as a merely national, doctrinal matter. Yet this approach is dated. What is really important to know—at least in an internal market such as in the European Union, but also beyond in a globalized world—is not company law in the books, but how company law functions within the company, on the market, and beyond the frontiers. This is true for lawmaking as well as for teaching and studying company law.[118] In this perspective comparative company law and securities regulation is a highly promising field for fundamental research.

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[117] Hadar Jabotinsky and Mathias Siems, 'How to Regulate the Regulators: Applying Principles of Good Corporate Governance to Financial Regulatory Institutions', ECGI Law Working Paper No 354/2017.

[118] Cf amongst others Markus Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft: Ein Beitrag zur Theorie der Corporate Governance* (2000); Martin Petrin, 'Regulatory Analysis in Corporate Law', Modern Law Review 72 (2016) 537; Brian R. Cheffins, 'Teaching Corporate Governance', (1999) 19 *Legal Studies* 515. More generally Philipp Hacker, *Verhaltensökonomik und Normativität, Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Tuebingen, 2017); Donald Wittman, *The Economics of Governance* (Cheltenham, 2017).

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